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In the Supreme Court of the United States

OCTOBER TERM, 1977

ASSOCIATED MILK PRODUCERS, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 566 F. 2d 1293. The district court rendered no opinion.

JURISDICTION

The judgment of the court of appeals (Pet. App. 18a) was entered on February 6, 1978. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on March 3, 1978 (Pet. App. 19a). The petition for a writ of certiorari was filed on April 25, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an order directing transmittal of an inventory of grand jury materials to a district judge in another district for his ruling on requests to disclose those materials in a related civil proceeding is an appealable order.

2. Whether the district court's order granting intervention under Fed. R. Civ. P. 24(a)(2) was an appealable order in the circumstances of this case.

3. Whether orders denying motions to quash a grand jury subpoena and to stay grand jury proceedings were appealable orders in the circumstances of this case.

STATEMENT

On February 1, 1972, the government filed a civil antitrust suit in the United States District Court for the Western District of Texas, alleging that petitioner had violated Sections 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1 and 2. During 1971 and 1972, private parties filed 15 similar suits against petitioner. The private cases were designated as complex litigation and assigned for pretrial proceedings to Judge John W. Oliver of the Western District of Missouri (Pet. App. 4a). *In re Midwest Milk Monopolization Litigation*, 379 F. Supp. 989 (J.P.M.L.). In February 1974 the government suit was also transferred to the Western District of Missouri for coordinated pretrial proceedings with the private litigation (Pet. App. 5a). In August 1974 the United States and petitioner filed a proposed consent decree in the government suit, which was subsequently entered and affirmed on appeal (*ibid.*). *United States* v. *Associated Milk Producers, Inc.*, 394 F. Supp. 29 (W.D. Mo.), affirmed, 534 F. 2d 113 (C.A. 8), certiorari denied *sub nom. National Farmers' Organization, Inc.* v. *United States*, 429 U.S. 940.

In January 1974, certain of the private plaintiffs, including the National Farmers' Organization (NFO), claimed that petitioner had frustrated discovery in their suits by destroying and concealing evidence. Accordingly, they sought sanctions against petitioner pursuant to Fed. R. Civ. P. 37(b) (Pet. App. 5a). NFO's motions for sanctions are still pending before Judge Oliver. The government did not join the motions for sanctions in the civil action but participated in discovery relating to the motions (*ibid.*).

On February 11, 1975, a grand jury was convened in the Western District of Texas to investigate possible obstruction of justice by petitioner in connection with the milk monopolization cases. Petitioner's motions to quash subpoenas and stay the grand jury proceedings were denied by the district court in orders dated February 19 and May 6, 1975 (Pet. App. 20a, 21a, 29a).

The grand jury completed its term on August 6, 1976, without returning an indictment against petitioner (Pet. App. 6a). In a letter to the district court, however, the grand jury recommended that the transcripts and documents produced and received by the grand jury be retained by the court and that the business records collected in the course of the grand jury's investigation be made available to other courts pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure (Pet. App. 25a-26a). On August 25, 1976, the government stated that it had no objection to the entry of an order making the grand jury materials available for use in connection with the Rule 37 sanction motions pending before Judge Oliver in the Western District of Missouri (Pet. App. 28a-30a). Judge Spears, in the Western District of Texas, thereupon ordered that the grand jury materials be sent to Judge Oliver for such use as Judge Oliver deemed appropriate (Pet. App. 6a-7a).

On October 1, 1976, in response to petitioner's motion, Judge Spears modified his earlier order and directed the clerk to send Judge Oliver only an inventory of the grand jury materials for his *in camera* inspection and subsequently to transmit to Judge Oliver only those grand jury materials for which the latter found a "compelling need" (Pet. App. 7a-22a). Judge Spears noted in his order that he did not intend to make any finding with respect to the propriety of any subsequent disclosure of the grand jury materials (Pet. App. 23a). On November 4, 1976, the district court granted NFO's motion to intervene in the proceedings relating to the disposition of the grand jury materials (Pet. App. 7a).[1]

Petitioner then filed notices of appeal from the district court orders of February 19 and May 6, 1975, denying its motion to quash a grand jury subpoena and to stay the grand jury proceedings, and from the orders of October 1 and November 4, 1976, transmitting the inventory of documents to Judge Oliver and allowing NFO to intervene. The court of appeals dismissed the appeals for lack of finality (Pet. App. 1a-18a).

The court held that the district court's orders of February 19 and May 6 denying petitioner's motions to quash the grand jury subpoenas and to stay the grand jury investigation were "inextricably linked" to the pending private litigation and were not appealable because petitioner would have an adequate opportunity to raise its claims in the proceedings before Judge Oliver (Pet. App.

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[1]In compliance with the October 1, 1976 order, the district court clerk forwarded the inventory to Judge Oliver. Judge Oliver, however, has respected the stays subsequently entered (Pet. 8, n.5; Pet. App. 45a), and none of the grand jury materials have been transferred.

14a-15a). The court held that the order authorizing the transfer of the inventory of grand jury materials for possible future disclosure was not final since "[n]o one has yet been aggrieved and no one will become aggrieved until Chief Judge Oliver acts" (Pet. App. 15a-17a). With respect to the order of November 4, 1976, which granted NFO the right to intervene, the court pointed to the well-settled principle that an order allowing intervention is interlocutory and not immediately appealable (Pet. App. 17a).

ARGUMENT

Only last Term this Court reaffirmed the "firm congressional policy against interlocutory, or 'piecemeal' appeals * * *." *Abney* v. *United States,* 431 U.S. 651, 656. The decision of the court of appeals in this case is faithful to that policy, it does not conflict with any decision of this Court or of any other court of appeals, and it presents no issue warranting review by this Court.

1. The order of October 1, 1976, which directed that Judge Oliver be provided with an inventory of grand jury materials for his *in camera* inspection (Pet. App. 22a-23a), is not a final order. The transfer of documents *in camera* from one federal judge to another is, as the Second Circuit has stated, "merely a mechanical step taken as a matter of 'judicial administration.'" *Baker* v. *United States Steel Corporation,* 492 F. 2d 1074, 1078 (C.A. 2).

Unlike the order involved in *State of Illinois* v. *Sarbaugh,* 552 F. 2d 768 (C.A. 7), certiorari denied *sub nom. J.L. Simmons Co.* v. *Illinois,* October 11, 1977 (No. 76-1611), the October 1 order does not even address, let alone decide, the propriety of disclosure to a litigant. The order specifically contemplated that Judge Oliver would make the decision whether or not to call for or disclose any document to petitioner's adversaries. If

Judge Oliver should decide to call for any of the grand jury documents, and if he should decide to disclose any of those documents in the proceeding before him, petitioner would have appropriate recourse in the Eighth Circuit.[2]

To permit an immediate appeal from Judge Spears' order would contravene various of the interests that the principles of finality were designed to foster. First, Judge Oliver may not call for any of the grand jury documents, or he may decline to disclose them in the proceedings before him. Thus, appellate review may never be necessary to avert the injury that petitioner foresees as flowing from Judge Spears' order. Second, if disclosure is ultimately ordered and an appeal subsequently taken, that appeal will present the issues raised here far more concretely, presenting the court of appeals with the question of the propriety of the disclosure of particular documents in response to a particularized showing of need. Finally, postponing review until Judge Oliver acts on subsequent requests for release of the grand jury materials will avoid the prospect of two appellate decisions in the case by two different courts of appeals, on closely related questions.

In effect, Judge Spears' order simply transfered to Judge Oliver the decision whether to release the grand jury materials. The order is therefore analogous to an

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[2]The same distinction applies to several of the cases petitioner cites as conflicting with the decision of the court of appeals in this case. *Petrol Stops Northwest* v. *United States*, 571 F. 2d 1127 (C.A. 9), certiorari pending *sub nom. Douglas Oil Co. of California* v. *Petro Stops Northwest*, No. 77-1547, involved the use of grand jury materials in civil antitrust actions, but there the district court ordered disclosure of the materials to the plaintiffs for use in the litigation. See also *United States* v. *Byoir*, 147 F. 2d 336 (C.A. 5). Similarly, in *United States* v. *Doe*, 455 F. 2d 1270 (C.A. 1), the district court had permitted the disclosure of the materials to another grand jury in another district, and it appeared that unless the First Circuit considered the appeal from that disclosure order, the order would never receive appellate consideration.

order granting a motion to transfer under 28 U.S.C. 1404(a). In that context, the courts have uniformly held that an order transferring a case from one district to another under Section 1404(a) is unappealable. *Ellicott Machine Corp.* v. *Modern Welding Co., Inc.*, 502 F. 2d 178 (C.A. 4); *McCreary Tire & Rubber Co.* v. *Ceat*, 501 F. 2d 1032 (C.A. 3); *Fischer* v. *First National Bank of Omaha*, 466 F. 2d 511 (C.A. 8); *Stelly* v. *Employers National Insurance Co.*, 431 F. 2d 1251 (C.A. 5), certiorari denied *sub nom. Stelly* v. *Bauer Dredging Co., Inc.*, 401 U.S. 908. As Judge Goodrich explained in a leading case on the subject, "we cannot escape the conclusion that it will be highly unfortunate if the result of an attempted procedural improvement is to subject parties to two lawsuits: first, prolonged litigation to determine the place where a case is to be tried; and second, the merits of the alleged cause of action itself." *All States Freight, Inc.* v. *Modarelli*, 196 F. 2d 1010, 1011-1012 (C.A. 3).

For the same reasons, appeal is inappropriate here. Indeed, because of the appellate proceedings in this case, implementation of the October 1 order has already been delayed for more than a year and a half, while the motion for sanctions remains pending before Judge Oliver.

2. The order granting NFO the right to intervene is similarly interlocutory. It is well established that orders granting intervention are not final decisions. *In re Estelle*, 516 F. 2d 480, 484 (C.A. 5), certiorari denied, 426 U.S. 925; *Van Hoomissen* v. *Xerox Corp.*, 497 F. 2d 180, 181 (C.A. 9); *Roach* v. *Churchman*, 457 F. 2d 1101 (C.A. 8). Petitioner attempts to avoid the force of these and similar precedents by arguing that Judge Spears' order respecting intervention is final because the proceedings before him are at an end (Pet. 19). Both the district court and court of appeals, however, properly viewed the transfer of the inventory of grand jury materials as only part of a

proceeding that will continue before Judge Oliver. Not until that proceeding is concluded will any of the orders from which petitioner seeks to appeal become final.[3]

3. Finally, the court of appeals correctly ruled that the orders of February 19 and May 6, 1976, were not final. Those orders denied petitioner's motions to quash or modify a subpoena and to stay the grand jury proceedings. A party wishing immediate judicial review of the lawfulness of a subpoena may obtain it only by refusing to comply, being held in contempt, and contesting the lawfulness of the subpoena on appeal from the contempt citation. *United States* v. *Ryan*, 402 U.S. 530, 532; *Cobbledick* v. *United States*, 309 U.S. 323; *Alexander* v. *United States*, 201 U.S. 117.

Petitioner chose not to proceed in this manner, but instead produced the subpoenaed documents. The motion to quash or modify the subpoena is therefore moot. The motion to stay the grand jury proceedings is similarly moot now that the grand jury's term has expired without its returning an indictment, since there are no further grand jury proceedings to stay.

What apparently concerns petitioner is that it be permitted appellate review of the legal objection that underlay its motions to quash and to stay the grand jury proceeding: that the entire grand jury proceeding was infected by an improper governmental purpose. But the

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[3]Petitioner concedes (Pet. 19) that the ruling of the court of appeals that an order permitting intervention in this context is not final does not conflict with any decision of this Court or any other court of appeals. Petitioner suggests that the reason the issue has not been litigated elsewhere is "probably due to the obviousness of the answer" (*ibid.*). We think it more likely that the issue has not been litigated elsewhere because of the unusual character of this proceeding and the lack of force of the argument for appellate jurisdiction in this context.

only effect of that argument on any ongoing proceedings would be to buttress petitioner's argument against disclosure of the materials in the cases before Judge Oliver. Therefore, as the court of appeals correctly found, the issues raised by petitioner are "inextricably linked to the pending private treble damage * * * action" (Pet. App. 14a). The court thus properly relegated petitioner to relief before Judge Oliver and, ultimately, before the Eighth Circuit if it should in fact suffer any disclosure that it considers improper. See *In re Special March 1974 Grand Jury*, 541 F. 2d 166 (C.A. 7), certiorari denied *sub nom. Ingram Corp.* v. *United States*, 430 U.S. 929.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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